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No. 86-1051

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN MONTELEONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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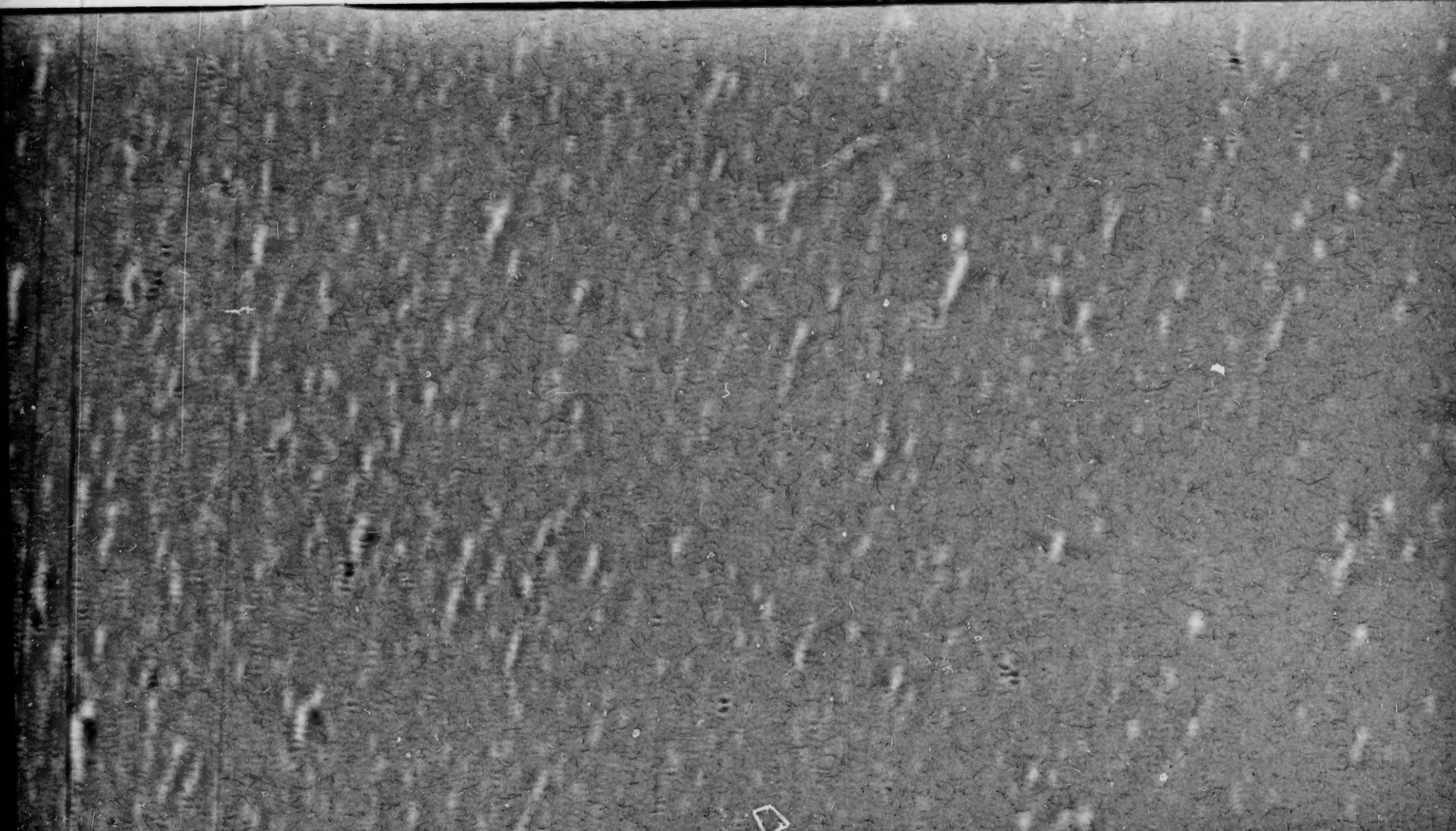

QUESTION PRESENTED

Whether petitioner's due process rights were violated because, at the time he was held in civil contempt for refusing to testify before a grand jury, the district court did not warn him that he could also suffer criminal sanctions for the same refusal.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 804 F.2d 1004.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15) was entered on November 3, 1986, and the petition for rehearing was denied on November 18, 1986 (Pet. App. 16). The petition for a writ of certiorari was filed on December 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted on one count of criminal contempt, in violation of 18 U.S.C. 401(3). He was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. 1-14).

1. In November 1979, petitioner was summoned before a federal grand jury that was investigating an attempted bombing in Milwaukee. Petitioner refused to testify, asserting his Fifth Amendment privilege against compelled self-incrimination. In 1983, petitioner was called before a federal grand jury that was investigating possible obstruction of justice charges in connection with his refusal to testify in 1979. When petitioner first appeared before the latter grand jury on August 2, 1983, he again refused to testify and asserted his Fifth Amendment privilege. The government requested an order granting petitioner immunity pursuant to 18 U.S.C. 6002. On October 5, 1983, the district court granted the immunity request and ordered petitioner to testify. The court informed petitioner that his further refusal to testify could result in his being "held in contempt" and that the government could request the court to "find [petitioner] in contempt and punish him accordingly." Pet. App. 2.

When petitioner next appeared before the grand jury, on November 1, 1983, he read a brief statement explaining that his refusal to testify in 1979 was based solely on the advice of counsel. Despite the grant of immunity, however, petitioner refused to answer any questions. The government immediately requested that petitioner be held in civil contempt pursuant to 28 U.S.C. 1826. The district court conducted a hearing the same day, held petitioner in contempt, and committed him to the custody of the United States Marshal until such time as he obeyed the order, but not to exceed the term of the grand jury. The court informed petitioner that he could "purge himself of contempt at such time as he convinces me that he is willing to appear before the grand jury and answer questions as asked." Pet. App. 2-3.

On January 17, 1984, petitioner was brought back before the grand jury. The attorney for the government reminded petitioner that he had already been held in civil contempt,

and then made clear that petitioner's refusal to testify "[could] also be considered a crime as well as a civil matter" (Pet. App. 3). Petitioner nevertheless persisted in his refusal to answer any questions. Petitioner was released from custody on the judgment of civil contempt three days later, when the grand jury's term expired. *Ibid.*

2. On March 28, 1985, the government applied under Fed. R. Crim. P. 42(b) for the issuance of a notice of prosecution against petitioner for criminal contempt. The district court issued the requested notice, which charged petitioner with contempt of court for his failure to obey the district court's orders of October 5, 1983, by refusing to testify in his appearances before the grand jury in November 1983 and January 1984. Petitioner was tried by a jury on evidence consisting largely of transcripts of his appearances before the grand jury and the district court. The jury found petitioner guilty, and he was sentenced to a term of four years' imprisonment. Pet. App. 3. The court of appeals affirmed the conviction (*id.* at 1-14), rejecting petitioner's contention that the Due Process Clause required the district court to inform him during the civil contempt proceedings that his recalcitrance also could result in criminal penalties (*id.* at 3-9).

ARGUMENT

Petitioner contends (Pet. 7-12) that his due process rights were violated because the district court did not inform him that his refusal to testify could also result in criminal penalties. This claim was correctly rejected by the court of appeals. Moreover, petitioner in fact was notified by the attorney for the government on January 17, 1984, that his continued refusal to testify could result in criminal sanctions.

1. The Due Process Clause did not require specific notification to petitioner that criminal sanctions might be imposed for his refusal to testify in accordance with the

district court's order. Indeed, petitioner expressly concedes (Pet. 10-11) that as a general rule, the Due Process Clause does not require a warning that particular conduct is contemptuous and criminal, since "ignorance of the law is no excuse" (Pet. 10).

Petitioner nevertheless argues that because he was first held in civil contempt in this case, the district court was required by the Due Process Clause to inform him that he might also be punished for criminal contempt. Petitioner does not challenge the *power* of the district court to impose both civil and criminal sanctions for the same conduct. See *United States* v. *United Mine Workers of America*, 330 U.S. 258, 294-295 (1947); *United States* v. *Nightingale*, 703 F.2d 17, 19 (1st Cir. 1983); *Daschbach* v. *United States*, 254 F.2d 687, 690 (9th Cir. 1958); *Yates* v. *United States*, 227 F.2d 848, 850-851 (9th Cir. 1955); cf. *Yates* v. *United States*, 355 U.S. 66, 72 (1957). As the Second Circuit explained in an opinion rejecting the same claim that petitioner advances, *United States* v. *Petito*, 671 F.2d 68, 72, cert. denied, 459 U.S. 824 (1982), civil and criminal contempt sanctions serve different purposes: the first is designed to compel obedience to a lawful court order, while the second is intended to punish the perpetrator of a completed offense and to vindicate the power of the court. " 'One who defies the public authority and willfully refuses his obedience, does so at his peril.' " *United States* v. *Petito*, 671 F.2d at 72 (quoting *United States* v. *United Mine Workers*, 330 U.S. at 303.

The fact that the district court in this case chose to find petitioner in civil contempt and commit him to the custody of the Marshal did not trigger a duty on the part of the district court to give petitioner a warning of possible criminal sanctions that petitioner concedes would not have been required if the district court had imposed criminal sanctions alone. As the Second Circuit stated in *Petito*, 671 F.2d at 73 (footnotes omitted):

> Appellant had committed the act subjecting him to criminal contempt at the moment he refused to answer questions after being granted immunity. Any remarks later made by [the trial judge], when Petito appeared before him for the second time, were after the fact of the contemptuous act. Appellant had already chosen to disregard the law and risk the consequences. To suggest that he is entitled to notice of those consequences or of the crime he had already committed as a prerequisite to being prosecuted is tantamount to adopting the doctrine—which we recently rejected as unsound—that ignorance of the law is an excuse. We have not been convinced that we should adopt a wholly new procedural right of notice in criminal contempt proceedings.

The court of appeals in this case relied on the same reasoning (Pet. App. 4 & n.2).

The court of appeals observed that affirmative warnings of the consequences of particular conduct ordinarily are required only when the conduct constitutes a waiver of rights. Pet. App. 7-8. In this case, however, petitioner had no rights to waive. Once he was immunized and ordered to testify, he had no more right to disobey the court's order "than a bank robber has to rob a bank, and therefore no greater right to be told in advance of the possible consequences of his act" (*id.* at 8). See also *United States* v. *Seale*, 461 F.2d 345, 366 (7th Cir. 1972); *United States ex rel. Shell Oil Co.* v. *Barco Corp.*, 430 F.2d 998, 1001 (8th Cir. 1970) ("There are many instances in our society when individual action may subject the actor to both criminal and civil sanctions. * * * It is not, in our view, necessary that the actor, at the time he contemplates the act, be certain as to which of the appropriate sanctions will be invoked.").

In any event, as petitioner concedes (Pet. 4), the attorney for the government explicitly informed petitioner during his second appearance before the grand jury on January 17, 1984, that his refusal to testify could give rise to criminal sanctions in addition to the commitment for civil contempt that he already was serving. It is obvious from this warning that the government would not have requested that petitioner be punished for criminal contempt if he had taken advantage of the second opportunity the government afforded him to testify before the grand jury, and had thereby purged himself of the civil contempt. Thus, even assuming that petitioner is correct that a grand jury witness who is committed for civil contempt must be notified that he could be held in criminal contempt as well, petitioner received fully adequate notice. That notice afforded precisely the additional protection for which he argues: "the opportunity to re-evaluate his decision not to testify in light of full knowledge of all the consequences—civil and criminal" (Pet. 9).

We note as well that petitioner was represented by counsel in connection with his grand jury appearances. It is highly unlikely that he would have failed to discuss with his attorney the consequences of a refusal to testify. Moreover, as the court of appeals observed, petitioner "has not actually claimed that he would have changed his mind about testifying if he had been told further sanctions could follow" (Pet. App. 4 n.1). To the contrary, petitioner's reading of a prepared statement at his first appearance indicates that he had made a firm decision not to testify, as does petitioner's refusal to change his mind at the second appearance, even after he was warned that criminal sanctions could follow.

2. Petitioner contends that review is warranted because the decision below conflicts with two decisions of the Ninth Circuit, *Yates* v. *United States*, 227 F.2d 848 (1955), and *Daschbach* v. *United States*, 254 F.2d 687 (1958). This

Court denied the petition for a writ of certiorari in *Petito* (459 U.S. 824 (1982)), in which the petitioner likewise asserted a conflict with the Ninth Circuit's decisions in *Yates* and *Daschbach* (Pet. at 8-13, *Petito* v. *United States, supra*).[1] There is no reason for a different disposition here.

The circumstances of this case are quite different from the circumstances of *Yates* and *Daschbach*. The underlying proceeding in each of the Ninth Circuit cases was a criminal prosecution under the Smith Act. The defendants were held in civil contempt for refusing to answer questions on cross-examination in the criminal case. Subsequently, after the defendants were released from custody following completion of the trial, they were found in criminal contempt for the same conduct in summary proceedings under Fed. R. Crim. P. 42(a). The Ninth Circuit held that the latter penalty could not be imposed because the defendants had not been warned at an "appropriate time" of the possibility of criminal sanctions. 227 F.2d at 851; 254 F.2d at 690.

The novel holding in *Yates* and *Daschbach* has never been followed in the Ninth Circuit or elsewhere in the period of almost 30 years since *Daschbach* was decided, and there is no indication that even the Ninth Circuit would extend the notice requirement under those decisions to non-summary criminal contempt proceedings pursuant to Rule 42(b), such as those in this case.[2] As this Court made clear in *United States* v. *Wilson*, 421 U.S. 309 (1975), and *Harris* v. *United States*, 382 U.S. 162 (1965), criminal

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[1]The petition for a writ of certiorari raising a similar claim also was denied in *Cavalieri* v. *United States*, 456 U.S. 973 (1982), although in that case the petitioner had waived the claim by not raising it in district court (see U.S. Br. in Opp. at 2, *Cavalieri* v. *United States, supra*).

[2]In *United States* v. *Abascal*, 509 F.2d 752, 755 n.3, cert. denied, 422 U.S. 1027 (1975), the Ninth Circuit declined to extend *Yates* and *Daschbach* to require notice of criminal sanctions in a different setting.

penalties should be imposed in a summary fashion under Rule 42(a) only guardedly. Summary contempt is justified for refusals to testify in the course of a criminal trial, but not during grand jury proceedings, because only in the former situation is there a need "to act swiftly and firmly to prevent contumacious conduct from disrupting the orderly progress of a criminal trial." *United States* v. *Wilson*, 421 U.S. at 319; *Harris* v. *United States*, 382 U.S. at 164. That justification is no longer available after the trial is completed, which is when the trial courts in *Yates* and *Daschbach* sought to invoke the summary procedures under Rule 42(a). The Ninth Circuit's reversal of the contempt citations in *Yates* and *Daschbach* thus can be understood as an effort to oversee the use of the summary contempt power.

In contrast to the defendants in *Yates* and *Daschbach*, petitioner received the full benefit of the "procedural regularity" prescribed by Rule 42(b). *Harris* v. *United States*, 382 U.S. at 167. Rather than being summarily punished by the judge at the conclusion of the trial for conduct that occurred during the trial, petitioner was formally charged, in a notice of prosecution filed by the Executive Branch, with failure to obey a court order; and he was tried on the contempt charge before a jury. Petitioner received all the process he was due in that trial. Contrary to petitioner's contention, the Due Process Clause did not impose a complete bar to his prosecution for criminal contempt simply because petitioner, who already had willfully disobeyed the court's order, did not receive a further admonition from the court about the full extent of the consequences of his action. In any event, even if a contemnor is entitled to notice of the possibility of criminal sanctions, petitioner received that notice in this case. Here, unlike in *Yates* and *Daschbach*, petitioner was notified of the possibility of criminal contempt sanctions when he was afforded a second opportunity to testify before the grand jury. He was told at that time that

he could be held in criminal contempt if he persisted in his refusal. Petitioner therefore received a sufficient warning at an " 'appropriate time' " (*Daschbach*, 254 F.2d at 690 (quoting *Yates*, 227 F.2d at 851)). The procedure followed in this case, in which petitioner was given notice at a time when he still had an opportunity to avoid criminal contempt sanctions, accordingly satisfied the basic principles of *Yates* and *Daschbach*.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]Petitioner argues (Pet. 11) that even if the Court does not believe that a prior warning was required by the Due Process Clause, the Court nevertheless should impose that requirement in the exercise of its supervisory power. Petitioner did not make this argument in the court of appeals, and it is without merit in any event. As explained in the text, petitioner has failed to show any compelling reason for establishing prior notice as an absolute prerequisite for the imposition of sanctions for criminal contempt in the unique context in which both civil and criminal sanctions are imposed, which would carve out an exception to the general rule that a person need not be apprised of the precise penalties that will result from his actions.